ARKANSAS COURT OF APPEALS
NOT DESIGNATED FOR PUBLICATION
JOSEPHINE LINKER HART, JUDGE

DIVISION III

CA07-1031

JONATHAN JORDAN
APPELLANT

March 19, 2008

V.

APPEAL FROM THE ARKANSAS WORKERS' COMPENSATION COMMISSION
[NO. F504518]

HOME DEPOT, INC.; American Home Assurance
APPELLEES

REVERSED AND REMANDED

JOSEPHINE LINKER HART, Judge

Appellant, Jonathan Jordan, argues that substantial evidence does not support the Arkansas Workers' Compensation Commission's decision that he was not entitled to additional medical treatment and temporary total disability benefits as a result of his compensable injury. We reverse and remand.

During his employment with appellee Home Depot, appellant suffered an admittedly compensable injury on the evening of September 27, 2003. Appellant was "installing racking on the end of an end cap," and he and another employee were on ladders, installing it over their heads. According to appellant, the racking was "notorious for not going into place the way it's supposed to, which required more force than normal." He further testified that "[w]hile we were pushing above my head into place, I was trying to get underneath it, but

the ladder couldn't go that far, so I bent forward and tried to push up to get it up and I felt my back pop, followed by immediate pain, and there was a lot of snapping and popping going on." Appellant descended the ladder. He did not immediately report the injury, as he hoped it was a minor injury, and he continued working to the end of his shift. The next day, however, he concluded that he needed to report the injury and see a doctor. At the emergency room, he was diagnosed with back strain.

Beginning on October 7, 2003, he began a number of visits to a chiropractor, Dr. Kirk Johnson. X-rays revealed "spondylolisthesis, congenital L-5 Grade I with bilateral pars defect." An MRI was performed on October 29, 2003, which showed "L5-S1 spondylolisthesis, Grade I." On January 7, 2004, Dr. Johnson opined that appellant had reached maximum medical improvement, noting that appellant did not return for a follow-up after his December 3, 2003, visit, and "considering his improvement up to that point, it would be reasonable to assume he was happy with his level of recovery and satisfactorily returned to regular duty work as recommended December 1, 2003." But Dr. Johnson noted that there were x-ray findings of "spondylolisthesis of L5, S1, involving bilateral pars separation and MRI findings ... confirming the spondylolisthesis...." He wrote that "[t]hese findings complicate his strain/sprain injury and affected the length and frequency of his treatment...."

Appellant again returned for treatment on February 27, 2004, because of the recurrence of lower back pain. On March 4, 2004, and again on April 21 and May 14, Dr. Johnson concluded that appellant was not a surgical candidate and should respond to

conservative treatment. A peer review was performed on May 19, 2004, and a physician advisor concluded that a referral to an orthopedic or neurological specialist with perhaps active rehabilitation was the appropriate treatment.

On June 3, 2004, appellant was seen by Dr. Carl Kendrick, who noted that appellant had spondylolisthesis at L5-S1, which was congenital, and a "strain super-imposed upon this that's chronic in nature." He concluded that treatment with exercise was the proper course. On June 17, 2004, Dr. Kendrick wrote that he did not think there would be a related disability and that he would insist that appellant go back to work. On July 6, 2004, Dr. Kendrick noted that he would give appellant "a note today to go to work, and I will see him back in a month and rate him." But on July 31, 2004, appellant went to the emergency room complaining of chronic lower back pain and seeking pain medication. On August 2, 2004, Dr. Kendrick noted that appellant wanted narcotics and was not compliant with the exercises. He also noted that he reviewed appellant's MRI and observed that "[t]here is a little bulge but mainly there is a spondo" and that he would see him back in a month.

Appellant, however, was seen by Dr. Kelly Danks on August 27, 2004, who assessed appellant as having spondylolysis and spondylolistheses at L5-S1. He wrote that "[i]t is true that this was very probably present prior to his injury; however, it is not unusual for these to become symptomatic after an injury." He concluded that, in his experience, "they do not tend to get better with time and at some time in the future surgical treatment will need to be considered." An x-ray showed "spondylolysis at L5-S1 with a grade 1 spondylolisthetic slip."

Appellant was then seen one year and seven months later, on March 28, 2006, by Dr.

Cyril Raben, who reviewed appellant's MRI from October 2003 and assessed appellant as having "spondylolisthesis of a Grade I-II with a right-sided S1 radiculopathy." On June 5, 2006, an MRI showed that appellant had "spondylolisthesis with anterior slippage of L5 on S1 by approximately one centimeter." In a letter dated July 17, 2006, Dr. Raben opined that appellant had a "previously existing condition of spondylolisthesis which was quiescent until his on-the-job injury. Therefore the acute proximate cause of his need for medical attention would be greater than 51% as a result of his on-the-job injury, they did hire him with this condition and the on-the-job injury will now require surgical intervention."

In his deposition of July 18, 2006, Dr. Raben described spondylolisthesis as a "slip forward of one vertebral body on the one below it." He further described it as a congenital abnormality. He explained appellant's condition of spondylolysis involved a "crack that usually fills in with some type of cartilaginous or fibrous material in the posterior elements, and that crack can remain non-symptomatic for years—forever...." But Dr. Raben further observed that if appellant forced himself "through a series of hyperextension load-bearing strains, then those cracks that are filled in with the fibrous or cartilaginous material can break." He further stated that "[i]t can break through that soft tissue or through the bone marrow and at that point it can become symptomatic, and also at that point it can have a progressive slip forward of one vertebral body on the one below it." He also noted that spondylolisthesis is L5/S1, while spondylolysis can only occur at one level, here L5. After reviewing the 2006 MRI, Dr. Raben opined that the spondylolysthesis was increasing and was a progressive condition, meaning that it was slipping. In a letter written on September 21, 2006, by Dr.

J. Michael Calhoun, the doctor opined that he agreed with Dr. Raben's assessment and his conclusion that the only other option was surgical intervention.

Before the Commission, appellant sought additional medical treatment and additional temporary total disability benefits. In its order, the Commission found that appellant failed to prove by a preponderance of the evidence that he was entitled to additional medical treatment and additional temporary total disability benefits. In denying additional medical treatment, it concluded that appellant "failed to prove by a preponderance of the evidence a causal connection between [appellant's] compensable injury and Dr. Raben's recommendation for surgical intervention." The Commission observed that appellant "has a congenital defect of spondylolisthesis. At most, [appellant's] compensable strain was a temporary aggravation of a pre-existing condition." In denying temporary total disability benefits, the Commission stated that appellant sustained a temporary aggravation of his underlying condition and returned to full duty on July 15, 2004, with no restrictions. The Commission found that "[t]he only possible basis for awarding [appellant] temporary total disability benefits is his alleged pain. Pain, in and of itself is not enough to extend [appellant's] healing period." Appellant argues on appeal that the Commission's decision was not supported by substantial evidence.

We begin our analysis by noting that we view the evidence in the light most favorable to the Commission's decision, and we affirm if the decision is supported by substantial evidence, which is evidence that a reasonable mind might accept as adequate to support a conclusion. *Hickman v. Kellogg, Brown & Root*, ___ Ark. ___, ___ S.W.3d ___ (Feb. 28,

2008). Where the Commission denies a claim because of the claimant's failure to meet his burden of proof, we affirm the Commission's decision if its opinion displays a substantial basis for the denial of relief. *Id*.

Our workers' compensation statutes provide that an "employer shall promptly provide for an injured employee such medical ... services ... as may be reasonably necessary in connection with the injury received by the employee." Ark. Code Ann. § 11-9-508(a) (Supp. 2007). Here, the Commission's decision to deny additional medical services was premised on the conclusion that appellant's compensable strain was a temporary aggravation of a pre-existing condition.

We conclude that the Commission's opinion does not display a substantial basis for the denial of additional medical services. We observe that the medical evidence indicates that appellant had a congenital defect with a superimposed injury. Rather than indicating that the pre-existing congenital defect was temporarily aggravated, the medical evidence indicates that the initial injury had caused his congenital defect to progressively worsen. Moreover, even appellees' chosen physician, Dr. Calhoun, concluded that surgery was warranted. In workers' compensation law, an employer takes the employee as he finds him, and employment circumstances that aggravate preexisting conditions are compensable. *Hickman*, *supra*. Accordingly, we reverse and remand for an award of additional medical benefits.[1]

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[1]In their brief, appellees also argue that appellant's back problems predated appellant's admittedly compensable injury and were perhaps caused by an earlier injury. In its decision, however, the Commission concluded that appellant "failed to prove by a preponderance of the evidence a causal connection between [appellant's] compensable injury and Dr. Raben's recommendation for surgical intervention." As for the injury

To receive temporary total disability benefits, the claimant must prove by a preponderance of the evidence that he was within a healing period and was totally incapacitated from earning wages. *Hickman*, *supra*. When an injured employee is totally incapacitated from earning wages and remains in his healing period, he is entitled to temporary total disability benefits. *Id*. The healing period ends when the employee is as far restored as the permanent nature of his injury will permit, and if the underlying condition causing the disability has become stable and if nothing in the way of treatment will improve that condition, the healing period has ended. *Id*. The determination of when the healing period has ended is a factual determination for the Commission and will be affirmed on appeal if supported by substantial evidence. *Id*.

The Commission's analysis of this issue was premised upon the conclusion that appellant suffered a temporary aggravation of a congenital condition and that the only basis for awarding temporary total disability benefits and extending the healing period was appellant's complaints of pain. Given this flawed premise, we reverse and remand for the Commission to reconsider its denial of an award of temporary total disability benefits.

Reversed and remanded.

ROBBINS and MILLER, JJ., agree.

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discussed, the Commission's opinion indicates that "[o]n September 27, 2003, [appellant] was installing display racking with another employee when he suffered a low back injury." This was the injury the Commission considered in its opinion, so the Commission's opinion may fairly be characterized as finding that this injury was the precipitating event, and the question was only whether the injury was temporary aggravation of a pre-existing condition, the congenital defect.